

Game without Rules

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Maximilian Steinbeis Sa 24 Feb 2018

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We don't pay for that. This seems to be the message Angela Merkel and her government want to convey to the Central and Eastern European neighbours who refuse to take their share of responsibility for the redistribution of refugees in the EU. You owe us, and if you don't deliver, the Chancellor signals to Hungary and Poland in particular, we won't pay. Those who feed and integrate refugees will get more EU structural aid, and you'll get less.

Fair enough. *Do ut des; nisi des non dā*. This is how contracting parties talk to each other since the days of Roman law, private autonomous actors who regard one another with chilly indifference, with nothing more in common than the contract they have concluded with each other. We have a deal, Polish and Hungarian friends, and what we expect from you is exactly what you promised when you closed it, and nothing more. All the rest, your judiciary, your media, your electoral shenanigans, are of no interest to us whatsoever and we leave that entirely to your private autonomy. All we want is that you to deliver on your promise.

Playing private-law hardball in this way seems to have a great advantage: It has a clear-cut, no-nonsense logic to it, no lofty constitutional principles, no pious talk of fundamental values and all that (although there's no harm in dropping the "values" word passingly as Merkel did in her speech), no democracy and rule of law which no two people mean the same thing by anyway. No delivery, no money. Very simple. Bam. Suspend payment.

But the bad news is that Hungary at least hasn't promised anything. Hungary has never agreed to that solidarity-based distribution of refugees invoked by the hardball-playing Chancellor. Hungary, together with the Czech Republic, Romania and Slovakia (and unlike Poland under its Civic Platform government at the time), had said 'No' loud and clear at that Council meeting on 22 September 2015, when the resettlement mechanism was decided. Which, of course, doesn't change the fact that Hungary, as Poland, is (or was) legally bound to the decision, which has since expired. But they did not agree. Anything that could be interpreted as a declaration of assent to an obligation to deliver? Nothing of that sort.

The obligation of Hungary and Poland to take in refugees did not arise from their approval, but from rules of collectively binding decision-making. These exist to impose a duty on someone without his assent. By being outvoted. Call it constitutional law.

Hungary has been subject to such a duty and yet did not accept any obligation for itself, explicitly and unabashedly. This is the actual scandal that puts Hungary in conflict with the "fundamental European values". Hungary and Poland are not just defaulting debtors or disloyal business partners. The problem we have with them is not primarily a problem under private law, but under public law. Has been the whole time. We cannot content ourselves with the way Hungary and Poland practice their membership in Europe as a common constitutional space.

But this is not necessarily what the Chancellor talks of when she admonishes that “solidarity” is “not a one-way street”. Whether one-, two- or multi-way street: this is not just a question of who or what travels to and from Hungary in which direction, but whether traffic rules are adhered to in the first place. As hardball-playing as the Chancellor may have come across the day before the EU summit: That she did not talk about at all.

What if?

What Hungary and Poland play is not just hardball. It’s a game without rules. And they don’t just play it with their own citizens and institutions. They’re playing it with us. And the more success we let them have, the more likely it is that Germany will one day fall into the hands of players who play only by rules of their own making. The debate on what this scenario could mean for the Federal Constitutional Court has already arrived in Karlsruhe. My report from the rather depressing annual press conference of the Constitutional Court is [here](#) (German).

I have met with [KLAUS FERDINAND GÄRDITZ](#) this week to run through this scenario in an extensive and, in my opinion, extraordinarily productive interview (German): How much would a sufficiently determined parliamentary majority in Germany get away with, in terms of neutralizing the Federal Constitutional Court, subjugating the judiciary, manipulating the electoral law, without having to change one letter of the *Grundgesetz*? Result: a lot.

A huge reason to celebrate this week was the fact that the journalist Deniz Yücel has finally been freed after more than a year of captivity in a Turkish jail. And yet, speaking of subjugated judiciary, this process casts an all the more alarming light on the conditions of rule of law in President Erdogan’s realm. [DILEK KURBAN](#) writes why this is and why the impression that the Turkish Constitutional Court is still somehow a reliable factor in nowadays Turkey couldn’t be more false.

It looks like a bizarre cold-war cloak-and-dagger spy novel what has taken place between Germany and Vietnam in the last few months, with a Vietnamese businessman kidnapped right out of Germany and resurfacing in Vietnam soon thereafter, where he was sentenced to a life in prison. [FIN-JASPER LANGMACK](#) and [BENJAMIN NUSSBERGER](#) analyse what international law has to say to both sides of this conflict (German).

Elsewhere

[ANTJE VON UNGERN-STERMBERG](#) and [JULIA WAGNER](#) scrutinize the ruling of the state constitutional court of **Rhineland-Palatinate**, which found nothing to object to with the way committee seats are allocated to the far-right AfD in the regional Parliament in Mainz (German).

[MATHIEU CARPENTIER](#) jumps in the almost 60-year-old and recently rekindled fray in **France** as to whether the president can push through a constitutional amendment by means of a referendum in accordance with Article 11 of the French Constitution (French).

ROSELINE LETTERON analyses a new decision of the **French** Constitutional Council, according to which it violates the principle of equality to reserve compensation for victims of terrorism and violence during the Algeria war 1954 to 1962 only for French citizens (French).

PHILIP ALLOTT shows why the **UK**, no matter how vigorously it pushes the Article 50 button, cannot simply leave the European legal system behind it.

ANNICK PIJNENBURG defends the **European** Court of Human Rights against the accusation that in the judgement of *J. R. v. Greece* it has closed its eyes to the conditions in Greek refugee hotspots and the shortcomings of the EU-Turkey deal.

MANUEL MÜLLER calmly prophesies to Emmanuel Macron that he will lose his fight against the *Spitzenkandidaten* process in the **European** elections in 2019 (German).

LORENZO GRADONI stages the recent Taricco disputes between the European Court of Justice and the **Italian** Constitutional Court as a parody of the famous caskets scene in the second act of Shakespeare's Merchant of Venice (Italian).

Next week, the German Federal Constitutional Court will decide whether a federal Minister of Education can rhetorically show the AfD the proverbial "red card" without unduly taking sides in the competition of the political parties. We will further learn if the ECJ in Luxembourg feels prepared to declare an EU fisheries agreement with Morocco invalid because it covers Western Sahara, which is occupied by Morocco in breach of international law. Finally, LAURENT PECH and KIM LANE SCHEPPELE will present ten questions and answers on the EU's capacity to fight authoritarianism. So plenty of things to do for us, and plenty of things to read for you!

All the best, and a successful week,

Max Steinbeis

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